

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

Estate of IRENE WILKINSON, Deceased.

REYNA WILKINSON,

Plaintiff and Appellant,

v.

LARRY WILKINSON, as Administrator, etc.,

Objector and Respondent.

F072270

(Super. Ct. No. VPR043782)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Bret D. Hillman, Judge.

Rich, Fuidge, Lane & Bordsen, Nicole D. Delrio and Elizabeth T. McCaulley for Plaintiff and Appellant.

Farley Law Firm, Michael L. Farley and Rhys C. Boyd-Farrell for Defendant and Respondent.

-ooOoo-

Appellant Reyna Wilkinson filed a petition in the trial court seeking a judicial determination that respondent Larry Wilkinson, as administrator of the estate of their mother, Irene Wilkinson, was liable for excluding a significant asset from that probate estate. The asset in question was an assignment to Irene (the Assignment) shortly before her death of a right to pursue litigation against the Estate of Janie Poonian¹ and respondent for apparent misappropriations that had adversely affected the interests of Irene and her five siblings as the beneficiaries of a testamentary trust. In response to appellant's petition in the trial court, respondent filed a motion for summary judgment asserting that Irene had waived her right to pursue the litigation referenced in the Assignment and, therefore, respondent could not be liable for his failure to list the Assignment as an asset of Irene's estate. The sole witness of the alleged waiver was Irene's attorney, who had spoken to her before her death. Said attorney's declaration was submitted by respondent as the supporting evidence for the motion. Since no contrary evidence was presented, the trial court granted summary judgment in respondent's favor. As more fully explained in our analysis below, we believe the trial court erred because respondent did not meet his burden as the moving party of establishing a clear waiver of Irene's rights under the Assignment. The conclusory declaration of Irene's attorney was inadequate for that purpose and, thus, the motion for summary judgment should not have been granted by the trial court. Accordingly, we reverse the judgment and remand the matter to the trial court with instructions to enter a new order denying the motion for summary judgment.

FACTS AND PROCEDURAL HISTORY

The action or proceeding in which appellant filed her petition in the trial court was the *Estate of Irene Wilkinson*, Tulare County Superior Court case No. 08-43782. As will become apparent, in order to adequately understand this case, it is necessary for us to

¹ Janie was Irene's deceased mother, and appellant's and respondent's grandmother.

consider a number of prior litigations, because the dispute embodied in appellant's petition is, at least to some extent, an outgrowth or repercussion of earlier controversies litigated between family members regarding estate issues. Therefore, we shall undertake a brief summary of the prior litigations among family members, since that background is necessary to comprehend the context of the present case. The basic family relationships are as follows: Appellant and respondent are brother and sister. Their mother was Irene, who died in 2007. Irene was one of six children of Paritem S. and Janie Poonian.

Prior Related Litigations

In his will, Paritem provided for the creation of a trust to administer his half of the community property, with his wife Janie to be the trustee and income beneficiary. In 1981, several years after Paritem's death, the Paritem Poonian Testamentary Trust (the Paritem trust) was finally established by order of the Sutter County Superior Court, with Janie as the trustee. Janie owned 50 percent of the trust assets individually, and the other 50 percent was held by her in her capacity as trustee. Under the terms of the Paritem trust, once Janie passed away, the assets of the trust were to be equally divided among the six children of Paritem and Janie, including Irene.

Until her death in 2005, Janie served as the trustee of the Paritem trust. During her administration of the Paritem trust, Janie filed a lawsuit against her granddaughter, Janie Munger, and her granddaughter's husband, Kewel Munger, for undue influence, fraud, intentional misrepresentation, and breaches of fiduciary duties. That lawsuit was resolved by a settlement in the amount of \$8.5 million. Janie chose to allocate the bulk of the settlement proceeds to herself and not to the trust.

As noted, under the terms of the Paritem trust, upon Janie's death, the remainder of the trust property was to be split equally among the six children of Paritem and Janie, one of whom was Irene. Janie's estate plan, however, took a different course: Janie's plan was to primarily give her estate to respondent. Respondent was named by Janie to be administrator of her estate.

Janie passed away in October 2005. Upon her death, respondent was appointed as administrator of her estate and filed a petition seeking to probate Janie's estate. Many of the children of Paritem and Janie, however, filed objections and contests to the probate of Janie's estate. Due to the various objections and the relationships of the parties, Joseph Etienne was appointed to serve as the successor trustee of the Paritem trust, and Bruce Bickel was appointed special administrator of Janie's estate.

The objections raised by the several children of Paritem and Janie (other than Irene) were based on their belief that Janie had misallocated the proceeds received from the \$8.5 million settlement by assigning most of it to herself and failing to allocate to the Paritem trust its rightful share of the settlement proceeds, and also that Janie, with respondent's participation and collusion (individually and as administrator of Janie's estate), improperly transferred assets belonging to the Paritem trust into other trusts, accounts and/or entities for respondent's benefit, which if unchallenged would result in considerable assets that should have been in the Paritem trust going to respondent instead. Therefore, the beneficiaries of the Paritem trust (other than Irene) were willing to pursue litigation in order to recover those assets from Janie's estate and from respondent.

In August or September 2007, Etienne, as successor trustee of the Paritem trust, obtained the authorization of the trial court to assign to the individual beneficiaries of the Paritem trust their pro rata interests in pursuing the causes of action against Janie's estate and against respondent. Thereafter, each of the six beneficiaries (i.e., Irene and her five siblings) received an assignment of his or her one-sixth interest in the right (which would otherwise belong to the trustee) to pursue the causes of action for recovery of assets from Janie's estate and respondent.

On October 4, 2007, Irene's attorney, Thomas C. Brodersen, accepted on Irene's behalf the receipt of the Assignment to Irene of her one-sixth interest in the right to pursue the above described causes of action against Janie's estate and against respondent. Three days later, on October 7, 2007, Irene passed away.

On January 18, 2008, three months after Irene's death, Irene's surviving siblings instituted an action against respondent and against Janie's estate to recover the assets allegedly misappropriated from the Paritem trust. The action was joined by the children of Irene's one predeceased sibling. The action was brought pursuant to the assignments described above that gave to each beneficiary of the Paritem trust a right to pursue a recovery based on his or her individual one-sixth interest. Following a court trial, a final statement of decision was issued on January 30, 2012. The court, Judge Vortman presiding, found that substantial misappropriation of trust assets had occurred. The total monetary loss to the trust from the misappropriation was determined to consist of two component amounts of \$6,611,298.28 and \$1,756,767 (a sum total of \$8,368,065.28). However, the damage award to each of the filing petitioners in the case was factored based on a recognition of the one-sixth interests involved, as required by the assignments. Accordingly, each of Irene's four surviving siblings who were petitioners in the litigation were entitled to a one-sixth share of the damages, which came to \$1,394,677.55 each. As to the two children of the predeceased fifth sibling, the court held they would each receive one-half of the predeceased sibling's one-sixth share, which came to \$697,338.77 each. As this summary indicates, Irene's one-sixth share was not awarded to anyone.

The Present Litigation and the Grant of Summary Judgment

As noted above, Irene received the Assignment on October 4, 2007, and she died three days later, on October 7, 2007.

On January 11, 2008, respondent filed a probate petition (*Estate of Irene Wilkinson* (Super. Ct. Tulare County, 2008, No. 08-43782)), seeking to be appointed as the administrator of Irene's estate. The probate petition was granted on March 10, 2008, with the letters of administration being issued on March 13, 2008. On June 5, 2008, a final inventory and appraisal was filed by respondent in Irene's estate. However, the final inventory and appraisal, which was supposed to list all of the assets in Irene's estate, failed to include the Assignment that Irene had accepted through her attorney before her

death. Instead, the sole asset listed by respondent was an account containing \$50,000 in cash. On September 12, 2008, respondent filed a petition for final distribution and for an order allowing compensation for all services rendered. The petition was granted as prayed. The above probate filings submitted by respondent in the trial court consistently represented that Irene died intestate, that her only property was the \$50,000 account, and that her sole heirs were her two children, appellant and respondent.

On September 10, 2014, after discovering that Irene had received the Assignment prior to her death,² and in light of the fact that the Assignment had not been listed by respondent as an asset in Irene's estate, appellant filed her petition in the trial court against respondent, seeking (among other relief) an order requiring respondent to pay Irene's estate the sum of \$1,673,613.06, which appellant alleged represented Irene's one-sixth interest in the 2012 judgment obtained by the other siblings in their lawsuit for misappropriation of trust assets against Janie's estate and respondent.³ Appellant asserted that because the Assignment was not listed in the probate, she never received her beneficial interest in pursuing those claims against Janie's estate and against respondent that Irene's other siblings (and the two children of Irene's predeceased sibling) had received. Appellant's theories of recovery set forth in her petition included wrongful taking, breach of fiduciary duty, conflict of interest, intentional misrepresentation and concealment.

On December 24, 2014, respondent filed a motion for summary judgment as to all causes of action in the petition on the ground that, prior to her death, Irene intentionally

² Appellant's petition alleged that she was first made aware of the Assignment on January 21, 2014, when she received an email containing that information from Etienne's office.

³ Appellant's petition alleged that a one-sixth interest in the judgment would be \$1,673,613.06, while the statement of decision in that litigation calculated a one-sixth interest to be \$1,394,677.55. It is not clear whether there is a reasonable explanation for this inconsistency, and the parties have not sought to explain it. In any event, the question is not before us on appeal.

waived or disavowed any right or interest she had in pursuing the claims against Janie's estate and respondent. In support of the assertion of waiver, respondent provided the declaration of Irene's attorney, Thomas C. Brodersen. Brodersen's declaration stated, in relevant part, as follows: "At all times relevant since discovering the Objectors' intended objective to seek reimbursement for the Paritem Trust from [respondent] and Janie's Estate, Irene personally advised me that she did not agree with the Objectors' allegations of wrongdoing by [respondent] or by Janie during the course of administering the Paritem Trust. Prior to her death, Irene clearly and unequivocally advised me of her desire to waive, and otherwise disclaim, any interest in the objections and claims against [respondent], Janie's Estate, and Janie's Trust." Brodersen further stated that, prior to Irene's death, he had filed a case management conference statement in the *Estate of Janie Poonian*, Tulare County Superior Court case No. 06-42600, in which he wrote on behalf of his client, Irene, that "[s]he is not in favor of the challenge to Janie Poonian's trust and does not want her beneficial share of the Paritem Poonian trust to be diminished by it." A copy of the case management conference statement was attached to the declaration. Although Brodersen admitted in his declaration that on October 4, 2007, he "accepted the assignment of behalf of Irene," he added that "at no time did Irene intend to ... participate in any of the proceedings related to the Objectors' objections and claims."

In its written order filed on April 21, 2015, the trial court agreed with respondent that the declaration of Brodersen was sufficient to establish that Irene had waived any and all right to pursue the claims of misappropriation of Paritem trust assets against Janie's estate and respondent. And, since there was no contrary evidence of Irene's intent, the trial court granted the motion for summary judgment. Judgment was entered in favor of respondent on April 30, 2015. Appellant filed a timely notice of appeal from that judgment.

DISCUSSION

I. Standard of Review

Since the focus of the instant appeal is whether the trial court properly granted respondent's motion for summary judgment, we begin with a brief overview of the standard of review that applies where a judgment is entered following the grant of a motion for summary judgment. As should be plain, respondent's motion for summary judgment was made as a defendant.

Summary judgment is appropriate when all of the papers submitted show there is no triable issue of material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

A defendant may move for summary judgment if it is contended that the action has no merit. (Code Civ. Proc., § 437c, subd. (a).) A defendant moving for summary judgment has the initial burden of showing a cause of action is without merit. A defendant meets that burden by showing that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. (*Id.*, subd. (p)(2).) If the defendant makes such a showing, the burden then shifts to the plaintiff to produce evidence demonstrating the existence of a triable issue of material fact. (*Ibid.*; *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) On the other hand, if the moving party fails to present sufficient, competent evidence to meet its initial burden, the court must deny the summary judgment motion. (See, e.g., *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468 [where the defendant seeks summary judgment based upon an affirmative defense, his initial evidentiary showing must support each element of the defense, or the motion must be denied]; *Rincon v. Burbank Unified School Dist.* (1986) 178 Cal.App.3d 949, 954 [to prevail on a summary judgment motion,

“the moving party must present *all* of the facts necessary to support a judgment in its favor”].)

On appeal from a summary judgment, our task is to independently determine whether an issue of material fact exists and whether the moving party is entitled to summary judgment as a matter of law. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) “We independently review the parties’ papers supporting and opposing the motion, using the same method of analysis as the trial court. Essentially, we assume the role of the trial court and apply the same rules and standards.” (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1373.) In so doing, we liberally construe the opposing party’s evidence, strictly construe the moving party’s evidence, and resolve all doubts in favor of the opposing party. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

II. Waiver Not Established by Moving Party

A common factual predicate of all of the claims alleged in appellant’s petition was that respondent had improperly or wrongfully failed to list the Assignment as an asset in Irene’s estate. Of course, rights embodied in an assignment of claims are typically considered an asset. It is well established that a right to pursue a claim or cause of action constitutes a property right or interest (see, e.g., *In re Marriage of Klug* (2005) 130 Cal.App.4th 1389, 1397 [““A cause of action to recover money damages ... is ... a form of personal property.””]), and that such a right or interest may be assigned (see Civ. Code, §§ 953, 954 [chase in action may be transferred].) In respondent’s motion for summary judgment, respondent admits that Irene, in fact, received the Assignment. Therefore, it would appear that the only arguably viable ground for respondent’s motion was his contention that Irene *waived* any rights that she received under the Assignment.⁴ In

⁴ In other words, respondent, as moving party, was not asserting that rights and interests embodied in an assignment of claims are not assets, but only that the rights and interests represented in the Assignment were waived and, therefore, it ceased to be an asset.

respondent's notice of motion for summary judgment, the ground for the motion was framed as follows: "The clear, uncontroverted facts establish that prior to her date of death, Irene knowingly and intentionally disavowed, waived and abandoned any rights she may have had under the ... Assignment." Based upon the alleged waiver, respondent argued in his motion that the Assignment no longer remained an asset that respondent had to list in Irene's estate. That is, assuming all rights under the Assignment were waived by Irene, nothing existed for respondent to report. For these reasons, respondent asserted that he was entitled to judgment as a matter of law against all of the claims made by appellant in her petition.

Since the issue of waiver was the crux of the motion for summary judgment, we believe the key to the present appeal is the question of whether Brodersen's declaration—the sole evidence on that issue—was sufficient to establish a legally effective waiver of Irene's rights reflected in the Assignment. If the declaration did not adequately show that such a waiver occurred, then the burden never shifted to appellant to demonstrate a triable issue of fact, and the motion should have been denied. To guide our analysis in seeking to answer that question, we first make a careful review of the law of waiver.

“““Waiver always rests upon intent.””” “““[W]aiver is the intentional relinquishment of a known right after knowledge of the facts.””” (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31 (*Waller*); accord, *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107.) Whether there has been a waiver is a question of fact. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1052.) “To constitute a waiver, there must be an existing right, knowledge of the right, and an actual intention to relinquish the right.” (*Id.* at p. 1053.) “The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right.” (*Waller, supra*, at p. 31.) As noted, an essential element of an intentional waiver is that it must be based on adequate knowledge, both of the relevant facts and of the rights that are being waived. (See *Padres Hacia una Vida Mejor v. Davis* (2002) 96 Cal.App.4th 1123, 1136;

Bickel v. City of Piedmont, *supra*, at pp. 1051, 1053; 30 Cal. Jur. (3d ed. 2013) Estoppel and Waiver, § 34, p. 873; see also *Jay v. Dollarhide* (1970) 3 Cal.App.3d 1001, 1029 [“No one can be held ‘to have waived a right, benefit, or advantage, where he acted under a misapprehension of the facts’”].)⁵ There must also be a clear showing of intent to give up such right, with the burden on the party claiming the waiver to prove it by clear and convincing evidence. (*Pacific Valley Bank v. Schwenke* (1987) 189 Cal.App.3d 134, 145.)

Once a waiver is accomplished, it precludes any subsequent assertion of the right. (*Harper v. Kaiser Cement Corp.* (1983) 144 Cal.App.3d 616, 619–620.) However, the burden is on the party claiming a waiver of a right “‘to prove it by clear and convincing evidence that does not leave the matter to speculation, and “doubtful cases will be decided against a waiver” [citation].’” (*Waller, supra*, 11 Cal.4th at p. 31; *City of Ukiah v. Fones, supra*, 64 Cal.2d at pp. 107–108; accord, *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 (*DRG*).)

As reflected in the above overview of the law, “[t]he primary essentials of the waiver of a right or privilege are a clear expression of waiver that is made with full knowledge of the facts and an intent to waive, shown by clear and convincing evidence.” (30 Cal.Jur., *supra*, Estoppel and Waiver, § 33, p. 872, fns. omitted.)⁶

⁵ As summarized by one treatise: “The waiver of an important right must be a voluntary act that is knowingly done with sufficient awareness of the relevant circumstances and the likely consequences. Necessarily, therefore, a waiver assumes the existence of an opportunity for choice between the relinquishment and the enforcement of the right.” (30 Cal.Jur., *supra*, Estoppel and Waiver, § 34, p. 873, fns. omitted.)

⁶ Additionally, we note that a waiver does not require consideration. (30 Cal.Jur., *supra*, Estoppel and Waiver, § 33, p. 872.) The doctrine of waiver “focuses on the conduct of only one party; consent of the other party is irrelevant.” (*Bickel v. City of Piedmont, supra*, 16 Cal.4th at p. 1051.) “Waiver refers to the act, or the consequences of the act, of one side.... Waiver does not require any act or conduct by the other party.” (*DRG, supra*, 30 Cal.App.4th at p. 59.)

In support of respondent's motion for summary judgment, respondent's separate statement of undisputed material facts (Separate Statement) stated, as fact No. 4, that "[Irene] did not agree with the Objectors' allegations of wrongdoing and malfeasance by [respondent] or Janie and she did not wish to pursue any claims or causes of action in the Trust Restitution Action." Fact No. 5 of the Separate Statement stated: "[Irene] clearly and unequivocally advised her attorney, Thomas C. Brodersen, that she desired to waive any interest in the objections and claims against Janie's Estate and [respondent]"; and fact No. 6 stated: "Prior to her death, [Irene] intentionally and knowingly disavowed, waived, and abandoned her right to pursue claims and causes of action against Janie's Estate and [respondent]."

As noted, the sole evidence in support of the above assertions of fact was the declaration of Brodersen, who averred in his declaration as follows: "At all times relevant since discovering the Objectors' intended objective to seek reimbursement for the Paritem Trust from [respondent] and Janie's Estate, Irene personally advised me that she did not agree with the Objectors' allegations of wrongdoing by [respondent] or by Janie, during the course of administering the Paritem Trust. Irene clearly and unequivocally advised me of her desire to waive, and otherwise disclaim, any interest in the objections and claims against [respondent], Janie's Estate, and Janie's Trust." Additionally, Brodersen noted in his declaration that he had filed in the trial court, prior to Irene's death, a case management statement stating that Irene "is not in favor of the challenge to Janie Poonian's trust."

We find that Brodersen's declaration was *too conclusory* to establish Irene's waiver of the rights embodied in the Assignment. Although the declaration does indicate that Irene expressed her desire not to pursue the litigation, that is not the same as a waiver. Hypothetically speaking, a person might initially be disinclined to pursue a litigation, especially one involving family members, only to be persuaded weeks or months later to join the same lawsuit—perhaps as a result of new or additional

information, or perhaps due to the urging by other family members to do so. The point is, until the statute of limitations expires, the person would be free to change his or her mind and join the lawsuit, despite having (and expressing) strong feelings against it initially. To reiterate, having strong feelings one way or the other about the proposed litigation is not the same as a waiver. Thus, the evidence that Irene made statements to the effect that she did not want to participate in the legal challenge with her siblings falls short of establishing a waiver.

The remainder of Brodersen's declaration is lacking in sufficient clarity and factual specificity to establish a waiver, keeping in mind the rule that the burden is on the party claiming a waiver of a right "to prove it by clear and convincing evidence ..., and "doubtful cases will be decided against a waiver" [citation]." (Waller, *supra*, 11 Cal.4th at p. 31.) Brodersen's declaration merely states, in conclusory fashion, that "Irene clearly and unequivocally advised me of her desire to waive, and otherwise disclaim, any interest in the objections and claims against [respondent], Janie's Estate, and Janie's Trust." This statement appears to represent Brodersen's own ultimate *conclusions* of the legal effect or import of what Irene may have said to him, but it fails to provide the substance of the actual words, context and conversation with Irene.⁷ In our view, the matter of waiver has not been clearly established here, and falls short of the necessary *prima facie* showing needed for purposes of a summary judgment motion. Since intent is critical and must be clearly manifested, the substance and context of what Irene actually said should have been included in the declaration, rather than merely Brodersen's conclusions as to the import of Irene's words. Furthermore, the declaration is also insufficient for the additional reason that it is unclear and equivocal whether or not Irene had sufficient

⁷ A client might say something that would lead his or her attorney to conclude that the client does not wish to pursue a right or even wishes to waive the right. Of course, whether the client's words or conduct actually constituted a waiver would be a question for the trier of fact.

knowledge of the nature of the rights involved, including the factual bases for the claims of liability.

As explained above, we hold that Brodersen’s declaration was insufficient to establish the asserted waiver because it constituted his conclusions without adequate foundational support in the form of factual detail. To support a grant of summary judgment, the moving party’s declaration must provide sufficient evidentiary facts, not merely conclusions or ultimate facts. (*Hayman v. Block* (1986) 176 Cal.App.3d 629, 639 [“The affidavits must cite evidentiary facts, not legal conclusions or ‘ultimate’ facts.”]; *Hoover Community Hotel Development Corp. v. Thomson* (1985) 167 Cal.App.3d 1130, 1136 [statement of someone else’s intent, unsupported by adequate supporting facts, is a mere conclusion that does not support summary judgment]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶¶ 10:119–10:123.1, pp. 10-48–10-49, ¶ 10:125, p. 10-54; *Sesma v. Cueto* (1982) 129 Cal.App.3d 108, 113 [conclusory declaration will not support summary judgment]; *Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 173 [declarations from three attorneys and a company executive that alter ego and agency allegations were “untrue” were “conclusory statements ... insufficient to furnish a basis for granting summary judgment”]; *Ahrens v. Superior Court* (1988) 197 Cal.App.3d 1134, 1146.) Here, because Brodersen’s declaration was conclusory and insufficient to provide clear and convincing support for the asserted waiver, the burden never shifted to appellant and the motion should not have been granted.

DISPOSITION

The judgment is reversed, with instructions that the trial court enter a new order denying the motion for summary judgment. Costs on appeal are awarded to appellant.

KANE, Acting P.J.

WE CONCUR:

DETJEN, J.

PEÑA, J.